



[4337-15-P]

## **DEPARTMENT OF THE INTERIOR**

### **Bureau of Indian Affairs**

#### **25 CFR Part 273**

**[190D0102DR/DS5A300000/DR.5A311.IA000119]**

**RIN 1076-AF24**

### **Education Contracts under Johnson-O'Malley Act**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** Under the Johnson O'Malley (JOM) Act, the Bureau of Indian Education (BIE) provides assistance, through contracts, for Indian students attending public schools and non-sectarian private schools. Congress recently updated the JOM Act with the JOM Supplemental Indian Education Program Modernization Act (JOM Modernization Act). This proposed rule would implement the JOM Act, as amended, to clarify the eligibility requirements for Indian students to receive the benefits of a JOM contract, to clarify the funding formula and process to ensure full participation of contracting parties, and to otherwise reconcile and modernize the rules to comport with the activities of the contracting parties under the Act, as amended.

**DATES:** Please submit comments by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any of the following methods:

- Federal rulemaking portal: <http://www.regulations.gov>. The rule is listed under the agency name "Bureau of Indian Affairs."

-E-mail: [consultation@bia.gov](mailto:consultation@bia.gov). Include the number 1076-AF24 in the subject line of the message.

- Mail: Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, U.S. Department of the Interior, 1849 C Street, N.W., MIB-4660-MS, Washington, DC 20240. Include the number 1076-AF24 in the subject line of the message.

- Hand delivery: Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, U.S. Department of the Interior, 1849 C Street, N.W., MS 4660, Washington, DC 20240. Include the number 1076-AF24 in the subject line of the message.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and search for Docket Number BIA-2018-0002. We cannot ensure that comments received after the close of the comment period (see DATES) will be included in the docket for this rulemaking and considered.

Comments on the information collections contained in this proposed regulation (see “Paperwork Reduction Act” section, below) are separate from those on the substance of the rule. Send comments on the information collection burden to OMB by facsimile to (202) 395-5806 or e-mail to the OMB Desk Officer for the Department of the Interior at [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov). Please send a copy of your comments to the person listed in the FOR FURTHER INFORMATION CONTACT section of this notice.

Please see “V. Tribal Consultation” of this preamble for addresses of Tribal consultation sessions on this proposed rule.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, (202) 273-4680; [elizabeth.appel@bia.gov](mailto:elizabeth.appel@bia.gov).

**SUPPLEMENTARY INFORMATION:**

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## **I. Background**

The JOM Act authorizes the Secretary of the Interior (Secretary) to enter into contracts with States, schools, and private nonsectarian organizations, and to expend appropriated funds in support of Indian students under such contracts. *See*, 25 U.S.C. 5341 *et seq.* Federally recognized Indian Tribes and Tribal organizations are also eligible to apply for JOM contracts. Contracts under JOM contain educational objectives that adequately address the educational needs of the Indian students who are to be beneficiaries of the contract and assures that the contract is capable of meeting such objectives. *See*, 25 U.S.C. 5345. The regulations at 25 CFR part 273 implement this

authority. The regulations at 25 CFR part 273 became effective in 1975 and the rule has been in effect over 40 years without substantial changes. In 2018, Congress updated the JOM Act with the JOM Modernization Act. This proposed rule, if adopted, would update 25 CFR part 273 to implement the JOM Modernization Act and make other changes necessary to update the rule, as described below.

## **II. Overview of Proposed Rule**

The JOM Modernization Act requires the BIE to revise the existing regulations at 25 CFR part 273, to:

1. Determine how the regulatory definition of “eligible Indian student” may be revised to clarify eligibility requirements for contracting parties under the Act;
2. Determine, as necessary, how the funding formula described in § 273.31 may be clarified and revised to ensure full participation of contracting parties and provide clarity on the funding process under the Act; and
3. Reconcile and modernize the rule to comport with the activities of the contracting parties under the Act.

The proposed rule includes changes to meet these requirements. Specifically, the proposed rule would:

- Revise who is an eligible Indian student;
- Clarify how funds can be used;
- Describe how a new contracting party can enter into contracts;
- Revise what requirements do not apply to Tribal organizations;
- Revise the funding formula to reflect how it is currently calculated;
- Clarify the annual reporting requirements;

- Clarify the contract renewal process;
- Add a new subpart J – Responsibility and Accountability, to address the Secretary’s reporting requirements and compliance with Paperwork Reduction Act; and
- Clarify appeals processes.

Other technical edits would:

- Revise the rule generally to meet plain language requirements;
- Add, delete, and revise definitions to provide clarity;
- Divide long sections into shorter sections to provide clarity; and
- Update citations and remove citations that no longer apply.

The BIE has proposed changes that reflect the need to update Part 273 and to incorporate the new requirements of the JOM Modernization Act. The BIE welcomes comments on those subparts that are new and on the substantive changes to the current rule, including: terms and definitions; eligible entities; eligible students; funding formula; annual reporting requirements; contract renewal process; and appeals. The following provides more background and detail on these proposed changes.

#### **A. Indian Student Eligibility**

On March 21, 2018, the Bureau of Indian Education (BIE) proposed a rule to update one section of the JOM regulations regarding when Indian students are eligible for benefits of JOM education contracts, to delete the requirement that the Indian student must have  $\frac{1}{4}$  or more degree of Indian blood. *See* 83 FR 12301. BIE received six relevant comment submissions on the proposed rule, which are summarized below. During this time, the JOM Modernization Act was also moving through Congress and ultimately

became law on December 31, 2018. *See* Pub. L. 115-404. The JOM Modernization Act requires rulemaking on the same topic as the March 2018 proposed rule: student eligibility for the benefits of JOM education contracts. BIE is now taking a new look at its March 2018 proposed rule based on comments received and proposing a new rule to address both the eligibility qualifications and the other requirements of the JOM Modernization Act.

## **1. History of Indian Student Eligibility for Benefits of JOM Education Contracts**

In 1957, the Bureau of Indian Affairs (BIA) published a rule, then at 25 CFR 33.4 (Contracts with public schools), which allowed for the expenditure of monies under contracts for the education of “Indian children of one-fourth or more degree Indian blood.” *See* 22 FR 10533 (December 24, 1957). In 1974, BIA finalized a rule updating part 33 and defining “Indian” at § 33.1(g) as an individual of one-fourth or more degree of Indian blood and a member of a Tribe, band, or other organized group of Indians, including Alaska Natives, which is recognized by the Secretary as being eligible for BIA Services. *See* 39 FR 30114 (August 21, 1974). In 1975, BIA replaced part 33 with part 273 and made changes in accordance with the Johnson O’Malley Act, 25 U.S.C. 452-456, as amended by the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638). *See* 40 FR 51282, 51286 (November 4, 1975).<sup>1</sup> In the new § 273.12, BIA listed the eligibility criteria for students as one-fourth or more degree Indian blood and recognized by the Secretary as being eligible for Bureau Services. *See* 40 FR 51303, 51305 (November 4, 1975).

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<sup>1</sup> Note: the BIA originally proposed replacing part 33 with part 403, but at the request of the Office of the Federal Register, ultimately redesignated part 33 as part 273. *See* 40 FR 40982 (September 4, 1975).

The eligibility provision has not been updated in the regulations since 1975. Prior to the 1990's, the Department implemented this regulation to require one-fourth or more degree Indian blood. In 1990, the U.S. District Court for the District of Nevada stated that this regulatory requirement was too restrictive. *See, Nevada Urban Indians, Inc. v. United States*, CV-N-90-238 BRT (September 12, 1990). In 1991, the Director of the then-Office of Indian Education Programs (the predecessor office to BIE), issued a memorandum to all Education Line Officers and JOM Coordinators stating that to be eligible for JOM services, the recipient must be:

- A member of, or at least a one-fourth degree Indian blood descendent of, a member of an Indian Tribe which is eligible for the special programs and services provided by the United States through the Bureau of Indian Affairs to Indians because of their status as Indians; and
- Reside on or near an Indian reservation or meet the criteria for attendance at a Bureau off-reservation boarding school.

In April 2015, BIE held a series of Tribal consultation sessions to address remaining confusion when counting eligible students and proposed various options for revision to allow greater flexibility. Most Tribal participants supported an option that would delete the word “and” from § 273.12, allowing for eligibility for students who are either Tribal members or have one-fourth degree Indian blood.

## **2. March 2018 Proposed Rule: Comments and Responses**

The March 2018 proposed rule would have revised § 273.12 of the regulations to define as eligible students only those students who are members of a federally recognized Tribe and delete the provision stating that students must also have one-fourth or more

degree Indian blood. The March 2018 proposed rule stated that the Department does not require a certain degree of Indian blood and, as such proposed to delete the requirement for a blood degree quantum.

BIE received six relevant comment submissions on the proposed rule. Three of the submissions, including one from a Tribe, generally supported the proposed rule. Another commenter supported the rule, but questioned whether there are statistics showing that the blood requirement has not been in use over the past 27 years. The other comments are summarized here.

*Comment 1: Delay the rulemaking until passage of the Johnson O'Malley Modernization Act.* A few commenters noted that legislation requiring Interior to conduct a new student count and addressing the same topic as the March 2018 rule was pending in Congress. One commenter specifically suggested delaying the rulemaking as the JOM Modernization Act was moving through Congress because that Act requires a rulemaking that would be duplicative of the proposed rule.

*Response:* BIE accepted this comment, delaying further action on the March 2018 proposed rule until the Act became law in December 2018 and is now proposing a new rule that takes into account both the requirements of the JOM Modernization Act and comments received on the March 2018 proposed rule.

*Comment 2: Retain the current regulation requiring a student to be both a member of a federally recognized Tribe and one-fourth degree of Indian blood or more.* One Tribal commenter interpreted the current regulatory language as requiring both Tribal membership and one-fourth degree of Indian blood or more. According to that Tribal commenter, removing the one-fourth blood quantum requirement would increase



the number of eligible students from 271,884 (the last national count of students funded through JOM, done in 1995) to over 1 million students. The Tribe's primary concern is that the funding per student will decrease to an unacceptable level.

*Response:* BIE does not currently require both membership and a one-fourth degree blood quantum because the U.S. District Court for the District of Nevada stated that requiring a student to meet both these requirements for eligibility was too restrictive. *See, Nevada Urban Indians, Inc. v. United States*, CV-N-90-238 BRT (September 12, 1990). In accordance with the requirements of the JOM Modernization Act, BIE will conduct an updated count of eligible Indian students to provide accuracy for Congress to determine the appropriate per-student funding amount.

*Comment 3: Allow Indian students to be eligible for benefits of a JOM contract if they are a member of a federally recognized Tribe or, in the alternative, are of one-fourth degree of Indian blood or more.* The National Indian Education Association (NIEA) pointed out in its comments that thousands of Native students have at least one-fourth blood quantum and currently participate in JOM programs, but are not Tribal members due to enrollment requirements (e.g., requirements that prevent enrollment until a certain age). The NIEA further noted that Tribes have the flexibility to provide services to students that are either enrolled in a Tribe or are descendants with at least one-fourth blood quantum. These students are eligible to attend BIE schools and participate in other Bureau-funded programs. The NIEA therefore recommended that the regulations reflect this approach of including students with at least one-fourth degree blood quantum as eligible for the benefits of JOM contracts, regardless of whether such students are Tribal

members, both to align the regulations with current practice and to provide parity with other Bureau-funded programs.

*Response:* The rule being proposed today would incorporate this change by defining an eligible student as one who is a member of, or is at least one-fourth degree Indian blood descendant of a member of a federally recognized Tribe. This new proposed rule will clarify that a student who is not enrolled in a federally recognized Tribe (e.g., due to enrollment requirements) is still eligible if the student has documentation of descendancy indicating at least one-fourth Indian blood from federally recognized Tribe. This new proposed rule better aligns with eligibility requirements for Indian students in other BIE programs, such as the Indian Student Equalization Program (ISEP). The ISEP, which applies to BIE-funded schools, requires an eligible Indian student to be a member of, or at least one-fourth degree Indian blood descendant of a member of, a Tribe that is eligible for the special programs and services provided by the United States through the Bureau to Indians because of their status as Indians, as well as residing on or near a reservation, or meets the criteria for attendance at a Bureau off-reservation home-living school. *See* 25 U.S.C. 2007(f).

*Comment 4: Clarify what it means to be eligible for Bureau services the definition of eligible students.* A few commenters noted the importance of clarity in the eligibility requirements. One commenter stated that the rule should specify the requirements for a student to be “recognized by the Secretary as being eligible for Bureau services.”

*Response:* BIE is addressing this comment by using language in the proposed rule that now refers to membership in a federally recognized Tribe. The Secretary

publishes on an annual basis a list of Indian entities recognized and eligible to receive services from BIA under the 1994 Lists Act. *See, e.g.*, 84 FR 1200 (February 1, 2019). This list is the list of federally recognized Tribes. Individuals are then eligible for Bureau services by virtue of the individual's membership in a federally recognized Tribe. The proposed rule would clarify this portion of the eligibility criteria.

### **3. Proposed Revisions to Indian Student Eligibility Requirements**

This proposed rule would establish clearer eligibility requirements for Indian students to obtain the benefits of a JOM contract by specifying that a student either must be a member of a federally recognized Tribe or at least one-fourth degree Indian blood descendant of a member of a federally recognized Tribe. *See* § 273.112 of the proposed rule.

#### **B. Funding Formula**

Within the current rule, the funding formula is the number of eligible Indian students multiplied by 25 percent of whichever is higher: the State average per pupil operating cost or National average per pupil operating cost. Since 1988, BIE has been using a funding formula that relies on data from the U.S. Department of Education on the State annual cost per pupil and the National annual cost per pupil to determine a weight factor. The weight factor is then used to calculate funding, subject to a minimum weight factor.

The JOM Modernization Act requires the BIE determine “as necessary,” how the funding formula may be “clarified and revised” to ensure full participation of contracting parties and provide clarity on the funding process. The BIE proposes to revise the funding formula to reflect the formula used since 1988, to ensure full participation of

contracting parties. The revised language will provide clarity on what source is used to determine the initial calculations, how the calculation is made to determine a weight factor by State, and how the minimum weight factor is to be used should the calculated weight factor for the State fall below the minimum. The funding formula for contracts will be based on the calculated weight factor and the number of eligible Indian students to be served by the contract.

The JOM Modernization Act, Section 7(e)(1)(A), includes a “hold harmless” provision that remains in effect for four years, which states that any existing contracting party may not receive an amount that is less than the amount that that party received for the fiscal year preceding the date of enactment of the Act. After expiration of the four years, the Act provides that no contractor may receive more than a 10 percent decrease from the amount received in the prior year. The BIE is not able to recommend a new funding formula without decreasing the funds made available to existing contracting parties; additionally, after four years it is possible that existing contractors may receive reductions in funding even beyond the FY 2017 levels. The BIE welcomes comments on this matter for any recommendations on how to revise the funding formula proposed in the rule to support all existing contracting parties receiving funding for JOM programs. Under the rule as proposed the funding formula at § 273.31 will be at § 273.140.

### **C. Other Reconciliation and Modernization**

The JOM Modernization Act requires BIE to otherwise reconcile and modernize the rules to comport with the activities of the contracting parties. After a thorough review of the current rule, there were areas that clearly required a revision. The revisions being

proposed are, among other things, intended to make the regulations more user-friendly through plain language.

### **III. Subpart-by-Subpart Summary of Proposed Changes**

#### **A. Subpart A – General Provisions and Definitions**

In subpart A, the BIE proposes to continue to address the substance of each of the existing sections (purpose and scope, definitions, revision or amendment of regulations, and policy of maximum Indian participation) with updates. For example, BIE proposes to split the purpose and scope section into several sections; add, revise, and remove definitions; and change requirements for revising or amending the regulations to provide that the Bureau will follow the Administrative Procedure Act. The BIE proposes to add a section on how the Secretary will ensure full geographic coverage and full participation to address a requirement in the JOM Modernization Act that the Secretary consult with eligible entities that have not previously participated in the JOM program.

#### **B. Subpart B – Program Eligibility & Applicability**

The proposed subpart B addresses the same topics of eligible applicants (but proposes updating the term to refer to “eligible entities” to reflect the language of the JOM Modernization Act) and eligible students as the current subpart B, but proposes moving the other subpart B topics to subparts C, D and E. The proposed subpart B would also address what funds may be used under JOM contracts and what programs may be contracted under the JOM Act. The BIE proposes to revise the description of “eligible students” to reflect information collected during previous Tribal consultations sessions and add examples of how JOM contract funds can be used. The BIE further proposes to

clarify which provisions Tribal organizations are subject to (*see* proposed § 273.111) and clarify that Tribal organizations are not excluded from the annual reporting requirements.

**C. Subpart C – Indian Education Committee**

The proposed subpart C would address the Indian Education Committee, which is in current subpart B. The BIE proposes to revise the description of “Indian Education Committee” to include preference in committee membership be given to parents and guardians of children enrolled in a school. The BIE also proposes to remove a requirement to report to the Bureau regarding who will serve on the Indian Education Committee. The BIE proposes to add that organizational papers and by-laws of the Indian Education Committee may include additional powers and duties that would permit the Committee to, among other things, establish policy and procedures for hearing grievances.

**D. Subpart D – Education Plan**

The proposed subpart D would address the contents of the Education Plan (currently addressed in subpart B) and would add a section specifying that an education plan will be approved by a Regional Director (updated from “Area Director”), under 25 U.S.C. 5345.

**E. Subpart E – Contract Proposal, Review, and Approval**

The BIE proposes to move provisions that are in the current subpart B regarding applications and requests to contract, contract review, and approval, to a new subpart E. This proposed subpart would include a section regarding how eligible entities who have not participated in the program in the past should submit a contract proposal. The BIE proposes to change the contract approval period from 60 days to 90 days and to indicate

that contract approval and award will be made through the applicable Regional office, eliminating the need for the central office to process and approve. The change from 60 to 90 days aligns JOM contract approval with the statutory 90-day approval period for both P.L. 93-638 contracts and P.L. 102-477 plans. The proposed subpart also includes updates to outdated statutory and regulatory citations. Since the BIE is responsible for administering Indian education programming for the Department, the BIE is considering changes to this proposed rule to reflect JOM contract administration partly or entirely through the BIE as opposed to the Bureau of Indian Affairs. The BIE welcomes comments on such possible changes.

#### **F. Subpart F – Funding Provisions**

The BIE proposes to move provisions that are in current subpart C to a new subpart F. The proposed subpart would revise the funding formula to reflect current practice, with the four-year “hold harmless” and phased decrease approach provided by the JOM Modernization Act. This proposed subpart would also move the section on advance payments from current subpart D and revise the section on advance payments to comply with 25 U.S.C. 5324(b).

#### **G. Subpart G – Annual Reporting Requirements**

The BIE proposes to revise reporting requirements to reflect the annual student count reporting requirements of the JOM Modernization Act. As such, the BIE proposes to add sections requiring an annual report, describing what must be included in the annual report, describing what will happen if a contractor fails to submit an annual report, and identifying who will notify a contractor that they have failed to submit an annual report. The BIE also proposes to add a section explaining that the Bureau is required to provide

technical assistance and training, and describing the process to request assistance to meet annual reporting requirements. The BIE proposes to add a section describing how a decrease in the reported student count will affect future funding. The BIE proposes to include language reflective of the JOM Modernization Act defining a “contracting party” as an entity that has a contract through a program authorized under this Act.

#### **H. Subpart H – General Contract Requirements**

Proposed subpart H addresses many of the same topics as current subpart D. In addition to updating outdated statutory and regulatory citations, the BIE proposes to update records requirements now that contract files are to be filed under the Department Records Schedule. The BIE proposes to revise a contractor’s responsibility for penalties under the Privacy Act requirements. The BIE proposes to revise who will investigate a complaint received of a Civil Rights Act violation in State school districts and provide that such investigations will be performed by the Department of Education and remove references to the Department of Justice.

#### **I. Subpart I – Contract Renewal, Revisions, and Cancellations**

Proposed subpart I would address the topics in current subpart E, but would also include new provisions adding a contract renewal process.

#### **J. Subpart J – Responsibility and Accountability**

The BIE proposes to add this subpart to meet requirements in the JOM Modernization Act which, among other things, requires the Secretary to provide an annual report to the Committee on Indian Affairs in the Senate, the Subcommittee on Interior, Environment, and Related Agencies of the Committee on Appropriations of the Senate, the Committee on Education and the Workforce of the House of Representatives,



and the Subcommittee on Interior, Environment, and Related Agencies of the Committee on Appropriations of the House of Representatives that includes a determination on the number of eligible students served by each contracting party, recommendations on appropriate funding levels for the program based upon such determination, and an assessment of the contracts under JOM.

#### **K. Subpart K – Appeals**

The BIE proposes to change this subpart (currently at subpart F) to encourage the use of an Alternate Dispute Resolution (ADR) process that has been established by the Department of the Interior prior to filing a formal appeal. The proposed subpart would also be amended to refer to the Contracts Dispute Act of 1978, 41 U.S.C. 7101 – 7109, which created the Civilian Board of Contract Appeals (CBCA). The CBCA is an independent tribunal with its own formal appeal process. Additional information on the CBCA can be found at: <https://www.dbca.gov/index.html>. Tribes and Tribal organizations may bring appeals involving Self-Determination Act contracts before the CBCA under 25 U.S.C. 5331(d)-(e).

#### **IV. Crosswalk of Proposed Changes to 25 CFR 273**

The crosswalk below lists the current sections, proposed sections, and a summary of proposed substantive changes. Except in a few instances, this table does not note non-substantive changes. For example, except in the definitions sections, the crosswalk does not note terminology changes that do not substantively affect the meaning (e.g. replacing “Area Director” with “Regional Director” or “Area Director or Commissioner” with “approving official,” “Bureau contracting officer” with “awarding official,” “application to contract” with “contract proposal” or “request”).

<b>Current 25 CFR Section</b>	<b>Proposed 25 CFR Section</b>	<b>Summary of Proposed Changes</b>
273.1(a) Purpose and Scope	273.101 What is the purpose and scope of this part?	No substantive change.
273.1(b) & (c)	---	Combines with current 273.11(b) and (c), into proposed § 273.111.
273.1(d) & (e)	273.105 How do these regulations affect existing Tribal rights?	No substantive change.
273.2 Definitions.	273.106 What key terms do I need to know?	<p>-Deletes definitions of “Commissioner,” “Pub. L. 93-638,” “Superintendent,” and “Assistant Secretary – Indian Affairs” because those terms are not used.</p> <p>-Adds definitions for “Academic year,” “Appeal,” “Approving official,” “Awarding official,” “Calendar year,” “Capital outlay,” “Contract,” “Contracting party,” “Contractor,” “Debt retirement,” “Director,” “Eligible entity,” “Existing contracting party,” “Fiscal year,” “Indian advisory school board,” “Initial contract proposal and contract proposal,” “Local Indian Committee,” “New contracting party,” “Public school district,” “Regional Director,” “School official or school administrator,” “Scope of work,” and “System of record.”</p> <p>-Replaces definition of “Area Director” with a definition of “Regional Director”</p> <p>-Revises the definitions of “Bureau” to refer to BIE, “Days” to address cases where a specified date falls on a weekend or holiday, “Johnson-O’Malley Act” to reflect statutory updates, and “Supplemental programs” to reflect updates to citations.</p>
273.3(a) & (e) Revision or amendment of regulations.	273.102 How will revisions or amendments be made to this part?	No substantive change.
273.3(b) & (c)	--	Deletes because this process is already required under the Administrative Procedure Act.
273.3(d)	--	Deletes annual consultation requirement because regulation already requires consultation for revisions or amendments.
273.4 Policy of	273.103 What is	No substantive change.

maximum Indian participation.	the Secretary's policy of maximum Indian participation?	
---	273.104 How will the Secretary extend geographic coverage and enhance participation under the Johnson-O'Malley Act?	New section.
273.11(a) Eligible applicants.	273.110 Who is eligible to request contracts under the Johnson-O'Malley Act?	Revises to clarify which school districts are eligible entities to contract, to define the purpose of the contracts, and to refer to requesting, rather than applying for, contracts.
273.11(b) & (c)	273.111 How do the requirements for Tribal organizations differ from those for other eligible entities?	Revises to state which provisions Tribal organizations are not subject to.
273.12 Eligible students.	273.112 Who is an eligible Indian student under the Johnson-O'Malley Act? and 273.128 How are contracts prioritized?	Revises based on recommendations received in prior Tribal consultations.
---	273.113 How can the funds be used under the Johnson-O'Malley Act?	New section.
273.13(a) & (b) Proposals eligible for contracts.	273.126 What proposals are eligible for contracts under the Johnson-O'Malley Act?	No substantive change.

273.13(c)	§ 273.129 May the Regional Director reimburse a public school district for educating non-resident Indian students?	No substantive change
273.14 Preparing the education plan.	273.119 What is an education plan and what must it include?	Revises the introduction paragraph to include language from 25 U.S.C. 5345 and combines sections.
---	273.120 Does an education plan need to be approved by the Regional Director?	New section.
---	273.121 When does the Regional Director approve the education plan?	New section.
273.15(a) & (b) Establishment of Indian Education Committee.	273.115 Who determines the unique educational needs of eligible Indian students?	No substantive change.
273.15(c) & (d)	273.116 Does an Indian Education Committee need to establish procedures and report to the Regional Director?	Deletes requirement to file as soon as practicable.
273.16(a) Powers and duties of Indian Education Committee.	273.117 What are the powers and duties of the Indian Education Committee?	No substantive change.
273.16(b)	273.118 Are there additional authorities an	No substantive change.

	Indian Education Committee can exercise?	
273.17(a) Programs approved by the Indian Education Committee.	273.114 What programs may be contracted under the Johnson-O'Malley Act?	No substantive change.
273.17(b)	273.171 Can a contractor make changes to a program approved by an Indian Education Committee?	No substantive change.
273.17(c)	273.127 Can a contract include funds to support the duties of an Indian Education Committee?	No substantive change.
273.18 Additional requirements for education plan	---	Combines with current section 273.14 (preparing the education plan), into proposed section 273.119.
273.19 Obtaining application forms.	273.125 How may a new contracting party enter into contract under the Johnson-O'Malley Act?	Revises language to reflect an initial contract proposal versus an application to contract.
273.20 Content of application to contract.	273.130 What is required in the contract proposal for funding?	Revises language to reflect an initial contract proposal versus an application to contract.
273.21 Tribal request for contract.	273.131 What is required for a Tribal request for a contract?	Deletes the February 1 deadline for requests to contract.
273.22(a) Application	273.132 Who will review and approve the	Revises to reflect current process of Regions and Regional Director.

approval officials.	contract proposal?	
273.22(b)	---	Deletes.
273.23 Submitting application to Area Office.	---	Deletes.
273.24 Area Office review and decision.	273.133 What is the process for review and decision?	Replaces “Part 2 of this Chapter” with “Subpart I of this part”
273.25 Deadline for Area Office action.	273.134 What is the timeframe for contract decision?	Extends timeline for approval from 60 days to 90 days to allow for additional review.
273.26 Submitting application to Central Office.	---	Deletes because proposals are submitted to Regions.
273.27 Central Office review and decisions.	---	Deletes because proposals are submitted to Regions.
273.28 Deadline for Central Office action.	---	Deletes because proposals are submitted to Regions.
273.29 Negotiating the contract.	273.135 Who will negotiate the contract?	No substantive change.
273.31(a) Distribution formula	273.140 What is the funding formula to distribute funds?	Revises to reflect the current funding formula calculated by the BIE.
273.31(b)	---	Deletes because there is no authority for exceptions in 25 U.S.C. 5342 <i>et. seq.</i>
273.32 Pro rata requirement.	273.141 Will funding be pro-rated?	No substantive change.
273.33 Use of funds for operational	--	Deletes because this is already part of the definition of “operational support.”

support.		
273.34 Use of other Federal, State and local funds.	273.143 Must other Federal, State and local funds be used?	No substantive change.
273.35 Capital outlay or debt retirement.	273.144 Can Johnson-O'Malley funds be used for Capital outlay or debt retirement?	No substantive change.
273.36 Eligible subcontractors.	273.145 How can funds be used for subcontractors?	No substantive change.
273.37 Use of funds outside of schools.	273.146 Can funds be used outside of schools?	No substantive change.
273.38 Equal quality and standards of education.	273.147 Are there requirements of equal quality and standard of education?	No substantive change.
273.41 Special program provision to be included in contract.	273.170 What special program provisions must be included in the contract?	No substantive change.
273.42 Civil Rights Act violations.	273.183 Can the Secretary investigate a potential Civil Rights Act violation?	Replaces "Department of Health, Education and Welfare" with "Department of Education," deletes requirement for a Memorandum of Understanding between the Department of the Interior and the Department of Health, Education, and Welfare. Deletes provision regarding formal hearings.
273.43 Advance payments.	273.142 Are advance payments on a contract allowed under the Johnson-O'Malley Act?	Replaces outdated citations with provision allowing Regional Director to determine installments and conditions under 25 U.S.C. 4324(b).

273.44 Use and transfer of Government property.	273.176 May there be a use and transfer of Government property?	No substantive change.
273.45(a)-(c) Indian preference.	273.174 Are there any Indian preference requirements for contracts and subcontracts?	Adds “for the benefit of Indian students” from 25 U.S.C. 5306(b), adds to (a) “in connection with the administration of such contract(s)” from 25 U.S.C. 5306(b), and deletes redundant language.
273.45(d)	273.175 How will a Tribal governing body apply Indian preference requirements for contracts and subcontracts?	Deletes language stating “subject to the provisions of part 14H of title 41” and “to the extent that such requirements are not inconsistent with the purpose and intent of paragraphs (a), (b) and (c) of this section.”
273.46 Liability and motor vehicle insurance.	273.177 Who will provide liability and motor vehicle insurance?	No substantive change.
273.47 Recordkeeping	273.178 Are there contract recordkeeping requirements?	Replaces “General Records Schedules and the Bureau Records Control Schedule” with updated records schedule.
273.48 Audit and inspection	273.179 Are there contract audit and inspection requirements?	Replaces “Comptroller General and the Secretary” with “Regional Director.”
273.49 Freedom of Information.	273.180 Are there disclosure requirements for contracts?	No substantive change.
273.50(a) Annual Reporting.	273.150 Does an existing contracting party need to submit any reports? and 273.151 What information must	Adds three additional reporting elements as required by Pub. L. 115-404: general information about the contractor, general information about the number and names of the schools, and the number of eligible Indian students who were served using the amounts allocated during the previous fiscal year.



	the existing contracting party provide in the annual report? and 273.152 When is the annual report due?	
273.50(b)	--	Deletes.
273.50(c)	273.153 Who else needs a copy of the annual report?	No substantive change.
---	273.154 What will happen if the existing contracting party fails to submit an annual report?	New section.
---	273.155 How will the existing contracting party know when reports are due?	New section.
---	273.156 Will technical assistance be available to comply with the annual reporting requirements?	New section.
---	273.157 What is the process for requesting technical assistance and/or training?	New section.
---	273.158 When should the existing contracting party request technical assistance and/or	New section.

	training?	
---	273.159 If the existing contracting party reported a decrease of eligible Indian students, how will funding be reduced?	New section.
---	273.160 Can the Secretary apply a ratable reduction in Johnson-O'Malley program funding?	New section.
---	273.161 What is the maximum decrease in funding allowed?	New section.
273.51 Penalties.	273.182 Are there penalties for misusing funds or property?	No substantive change.
273.52 State school law.	273.172 May State employees enter Tribal lands, reservations or allotments?	No substantive change.
273.53 Applicable procurement regulations.	273.173 What procurement requirements apply to contracts?	Replaces "Procurement Regulations (41 CFR part 1), as supplemented by the Interior Procurement Regulations (41 CFR part 14), and the Bureau of Indian Affairs Procurement Regulations (41 CFR part 14H), except 41 CFR part 14H-70" with "Acquisition Regulations at 48 CFR Part 1."
273.54 Privacy Act requirements.	273.181 Are there Privacy Act requirements for contracts?	Updates citations, and clarifies the potential for criminal penalties for knowingly and willfully disclosing a record about an individual without the written request or consent of that individual.

---	273.191 How may a contract be renewed for Johnson-O'Malley funding?	New section.
---	273.192 What is required to renew a contract?	New section.
273.61 Contract revision or amendments.	273.193 May a contract be revised or amended?	No substantive change.
---	273.194 Does the Indian Education Committee have authority to cancel contracts?	New section.
273.62 Cancelling a contract for cause.	273.195 May a contract be cancelled for cause?	Replaces "subpart C of 43 CFR part 4" for appeals with "subpart K of this part"
273.71 Contract Appeal And	273.206 May a contract be appealed?	Combines with current §§ 273.72 and 273.73 into proposed § 273.206.
273.72 Appeal from decision to cancel contract for cause.	---	Combines into proposed § 273.206.
273.73 Other appeals.	---	Combines into proposed § 273.206.
---	273.201 What is required for the Secretary to meet his or her reporting responsibilities?	New section.
---	273.202 Does this part include an information collection?	New section.

---	273.207 How does a contractor request dispute resolution?	New section.
---	273.208 How does a Tribal organization request an appeal?	New section.
---	273.209 How does a State, public school district, or an Indian corporation request an appeal?	New section.

### **III. Procedural Requirements**

#### **A. Regulatory Planning and Review (E.O. 12866 and 13563)**

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas.

We have developed this proposed rule in a manner consistent with these requirements.

This proposed rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

#### **B. Reducing Regulations and Controlling Regulatory Costs (E.O. 13771)**

E.O. 13771 of January 30, 2017, directs Federal agencies to reduce the regulatory burden on regulated entities and control regulatory costs. E.O. 13771, however, applies only to significant regulatory actions, as defined in Section 3(f) of E.O. 12866. Therefore, E.O. 13771 does not apply to this rule.

#### **C. Regulatory Flexibility Act**

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### **D. Small Business Regulatory Enforcement Fairness Act**

This proposed rule is not a major rulemaking under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

(a) Does not have an annual effect on the economy of \$100 million or more because the funding available through JOM does not approach this amount.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because this rule affects only certain education contracts.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises because this rule affects only certain education contracts.

#### **E. Unfunded Mandates Reform Act**

This proposed rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The proposed rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

#### **F. Takings (E.O. 12630)**

This proposed rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rulemaking, if adopted, does not affect individual property rights protected by the Fifth Amendment or involve a compensable "taking." A takings implication assessment is not required.

#### **G. Federalism (E.O. 13132)**

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement because the rule affects only individuals' eligibility under certain education contracts. A federalism summary impact statement is not required.

#### **H. Civil Justice Reform (E.O. 12988)**

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this proposed rule: (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

#### **I. Consultation with Indian Tribes (E.O. 13175)**

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has substantial direct effects on federally recognized Indian Tribes because one portion of the criteria for eligibility of Indian students is Tribal membership. We will consult with Tribes following publication of this proposed rule. BIE consulted with Tribes on the eligibility criteria in 2015 and provided an opportunity for input on this subject following publication of the March 2018 proposed rule; however, the statutory deadline for completion of this rulemaking December 31, 2019, prevents us from further consultation prior to publication of this rule.

#### **J. Paperwork Reduction Act**

This rule contains information collections requiring approval under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq. In accordance with the PRA, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues:

- (1) Is the collection necessary to the proper functions of the BIE;

- (2) Will this information be processed and used in a timely manner;
- (3) Is the estimate of burden accurate;
- (4) How might the BIE enhance the quality, utility, and clarity of the information to be collected; and
- (5) How might the BIE minimize the burden of this collection of the respondents, including through the use of information technology.

Comments you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR.

*Abstract:* The regulations at 25 CFR 273, Subpart E, implement in section 7(c) Contracting Party Student Count Reporting Compliance, of the Johnson-O'Malley Supplemental Indian Education Program Modernization Act (Pub. L. 115-404), enacted December 31, 2018. These regulations require the BIE to implement an annual reporting requirement for existing JOM contractors to report a student count served by each contracting party and for the BIE to provide an assessment on the contracts receiving JOM funds. The information received from the annual reporting requirements of the contractor will allow the Secretary to provide an annual report to the appropriate Committee and Subcommittees in the Senate and of the House of Representatives. The JOM Modernization Act indicates a "contracting party" is an entity that has a contract through a program authorized under this Act. It does not exclude Tribal organizations from the annual reporting requirements.

The Department is seeking approval for a new OMB Control Number.

*Title of Collection:* Johnson O'Malley Student Count Annual Report.

*OMB Control Number:* 1076–NEW.



*Type of Review:* New collection.

*Respondents/Affected Public:* Tribal organizations, States, public school districts, Indian corporations.

*Total Estimated Number of Annual Respondents:* 312.

*Total Estimated Number of Annual Responses:* 1,197.

*Estimated Completion Time per Response:* Ranges from 2 to 80 hours.

*Total Estimated Number of Annual Burden Hours:* 11,450.

*Respondent's Obligation:* Required to Obtain a Benefit.

*Frequency of Collection:* Annually.

*Total Estimated Annual Non-hour Burden Cost:* \$0.

#### **K. National Environmental Policy Act**

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because these are “regulations . . . whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 43 CFR 46.210(i). We have also determined that the rulemaking does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

#### **L. Effects on the Energy Supply (E.O. 13211)**

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

#### **M. Clarity of this Regulation**

We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- a) Be logically organized;
- b) Use the active voice to address readers directly;
- c) Use clear language rather than jargon;
- d) Be divided into short sections and sentences; and,
- e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the "ADDRESSES" section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

#### **N. Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

#### **V. Tribal Consultation**

The JOM Modernization Act requires the Secretary to undertake and complete a rulemaking process, following the provisions of subchapter II of chapter 5 of title 5 of the

United States Code, by December 31, 2019. The BIE will be engaging in Tribal consultation and consultation with eligible entities and interested parties. Eligible entities include existing JOM contractors and potential JOM contractors, including States, public school districts, tribal organizations, Indian corporations, and previously private schools. Interested parties include, but are not limited to, JOM Indian Education Committee members, employees of public schools serving American Indian students, urban Indian communities, parents, and students.

BIE will be hosting a listening session for interested Tribal representatives on June 24, 2019, at the National Congress of American Indians (NCAI) Mid-Year Conference in Sparks, Nevada. The BIE will also conduct the following consultations, in locations across the country that reflect the greatest number of JOM contracts.

<b>DATE</b>	<b>TIME</b>	<b>LOCATION</b>
July 16, 2019	8 a.m. – 10 a.m. (Local Time) Consultation with Tribes	Sequoyah High School 17091 S. Muskogee Ave., Tahlequah, OK 74464
July 16, 2019	1 p.m. – 3 p.m. (Local Time) Consultation with Eligible Entities	Sequoyah High School 17091 S. Muskogee Ave., Tahlequah, OK 74464
July 19, 2019	9:30 a.m. – 11:30 a.m. (Local Time) Consultation with Tribes	Bismarck, ND – Please check <a href="https://www.bie.edu/JOM">https://www.bie.edu/JOM</a> for specific location
July 19, 2019	1 p.m. – 3 p.m. (Local Time) Consultation with Eligible Entities	Bismarck, ND – Please check <a href="https://www.bie.edu/JOM">https://www.bie.edu/JOM</a> for specific location
July 23, 2019	9 a.m. – 12 p.m. (MDT) Consultation with Tribes	Please see <a href="https://www.bie.edu/JOM">https://www.bie.edu/JOM</a> for access information
July 23, 2019	1 p.m. – 4 p.m. (MDT) Consultation with Eligible Entities	Please see <a href="https://www.bie.edu/JOM">https://www.bie.edu/JOM</a> for access information
July 25, 2019	9 a.m. – 12 p.m. (MDT) Consultation with Tribes	Please see <a href="https://www.bie.edu/JOM">https://www.bie.edu/JOM</a> for access information

July 25, 2019	1 p.m. – 4 p.m. (MDT) Consultation with Eligible Entities	Please see <a href="https://www.bie.edu/JOM">https://www.bie.edu/JOM</a> for access information
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You can find additional information at the BIE JOM webpage at:

<https://www.bie.edu/JOM/>.

### **List of Subjects in 25 CFR Part 273**

Government contracts, Indians-education, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department of the Interior, Bureau of Indian Affairs, proposes to revise 25 CFR part 273 as follows:

### **PART 273—EDUCATION CONTRACTS UNDER JOHNSON-O’MALLEY ACT**

#### *Subpart A—General Provisions and Definitions*

Sec

- 273.101 What is the purpose and scope of this part?
- 273.102 How will revisions or amendments be made to this part?
- 273.103 What is the Secretary’s policy of maximum Indian participation?
- 273.104 How will the Secretary extend geographic coverage and enhance participation under the Johnson-O’Malley Act?
- 273.105 How do these regulations affect existing Tribal rights?
- 273.106 What key terms do I need to know?

#### *Subpart B – Program Eligibility & Applicability*

- 273.110 Who is eligible to request contracts under the Johnson-O’Malley Act?
- 273.111 How do the requirements for Tribal organizations differ from those for other eligible entities?
- 273.112 Who is an eligible Indian student under the Johnson-O’Malley Act?
- 273.113 How can the funds be used under the Johnson-O’Malley Act?
- 273.114 What programs may be contracted under the Johnson-O’Malley Act?

#### *Subpart C - Indian Education Committee*

- 273.115 Who determines the unique educational needs of eligible Indian students?

- 273.116 Does an Indian Education Committee need to establish procedures and report to the Director?
- 273.117 What are the powers and duties of the Indian Education Committee?
- 273.118 Are there additional authorities an Indian Education Committee can exercise?

*Subpart D - Education Plan*

- 273.119 What is an education plan and what must it include?
- 273.120 Does an education plan need to be approved by the Regional Director?
- 273.121 When does the Regional Director approve the education plan?

*Subpart E—Contract Proposal, Review and Approval*

- 273.125 How may a new contracting party request a contract under the Johnson-O'Malley Act?
- 273.126 What proposals are eligible for contracts under the Johnson-O'Malley Act?
- 273.127 Can a contract include funds to support the duties of an Indian Education Committee?
- 273.128 How are contracts prioritized?
- 273.129 May the Regional Director reimburse a public school district for educating non-resident Indian students?
- 273.130 What is required in the contract proposal for funding?
- 273.131 What is required for a Tribal request for a contract?
- 273.132 Who will review and approve the contract proposal?
- 273.133 What is the process for review and decision?
- 273.134 What is the timeframe for contract decision?
- 273.135 Who will negotiate the contract?

*Subpart F—Funding Provisions*

- 273.140 What is the funding formula to distribute funds?
- 273.141 Will funding be pro-rated?
- 273.142 Are advance payments on a contract allowed under the Johnson-O'Malley Act?
- 273.143 Must other Federal, State and local funds be used?
- 273.144 Can Johnson-O'Malley funds be used for capital outlay or debt retirement?
- 273.145 How can funds be used for subcontractors?
- 273.146 Can funds be used outside of schools?
- 273.147 Are there requirements of equal quality and standard of education?

*Subpart G—Annual Reporting Requirements*

- 273.150 Does an existing contracting party need to submit any reports?

- 273.151 What information must the existing contracting party provide in the annual report?
- 273.152 When is the annual report due?
- 273.153 Who else needs a copy of the annual report?
- 273.154 What will happen if the existing contracting party fails to submit an annual report?
- 273.155 How will the existing contracting party know when reports are due?
- 273.156 Will technical assistance be available to comply with the annual reporting requirements?
- 273.157 What is the process for requesting technical assistance and/or training?
- 273.158 When should the existing contracting party request technical assistance and/or training?
- 273.159 If the existing contracting party reported a decrease of eligible Indian students, how will funding be reduced?
- 273.160 Can the Secretary apply a ratable reduction in Johnson-O'Malley program funding?
- 273.161 What is the maximum decrease in funding allowed?

#### *Subpart H—General Contract Requirements*

- 273.170 Are there special program provisions to be included in the contract?
- 273.171 Can a contractor make changes to a program approved by an Indian Education Committee?
- 273.172 May State employees enter Tribal lands, reservations or allotments?
- 273.173 What procurement requirements apply to contracts?
- 273.174 Are there any Indian preference requirements for contracts and subcontracts?
- 273.175 How will a Tribal governing body apply Indian preference requirements for contracts and subcontracts?
- 273.176 May there be a use and transfer of Government property?
- 273.177 Who will provide liability and motor vehicle insurance?
- 273.178 Are there contract recordkeeping requirements?
- 273.179 Are there contract audit and inspection requirements?
- 273.180 Are there disclosure requirements for contracts?
- 273.181 Are there Privacy Act requirements for contracts?
- 273.182 Are there penalties for misusing funds or property?
- 273.183 Can the Secretary investigate a potential Civil Rights Act violation?

#### *Subpart I—Contract Renewal, Revisions, and Cancellations*

- 273.191 How may a contract be renewed for Johnson-O'Malley funding?
- 273.192 What is required to renew a contract?
- 273.193 May a contract be revised or amended?
- 273.194 Does the Indian Education Committee have authority to cancel contracts?
- 273.195 May a contract be cancelled for cause?

*Subpart J—Responsibility and Accountability*

- 273.201 What is required for the Secretary to meet his or her reporting responsibilities?
- 273.202 Does this part include an information collection?

*Subpart K—Appeals*

- 273.206 May a contract be appealed?
- 273.207 How does a contractor request dispute resolution?
- 273.208 How does a Tribal organization request an appeal?
- 273.209 How does a State, public school district or an Indian corporation request an appeal?

AUTHORITY: Secs. 201-203, Pub. L. 93-638, 88 Stat. 2203, 2213-2214 (25 U.S.C. 455-457), unless otherwise noted.

**Subpart A—General Provisions and Definitions**

**§ 273.101 What is the purpose and scope of this part?**

The purpose of this part is to set forth the process by which the Secretary will enter into contracts for the education of Indian students under the Johnson-O'Malley Act. Such contracts are for the purpose of financially assisting those efforts designed to meet the specialized and unique educational needs of eligible Indian students, including supplemental programs and school operational support, where such support is necessary to maintain established State educational standards.

**§ 273.102 How will revision or amendments be made to this part?**

Prior to making any substantive revisions or amendments to this part, the Secretary will consult with Indian Tribes and national and regional Indian organizations to the extent practicable about the need for revision or amendment and will consider their views in preparing the proposed revision or amendment. Nothing in this section precludes

Indian Tribes or national or regional Indian organizations from initiating a request for revisions or amendments.

**§ 273.103 What is the Secretary's policy of maximum Indian participation?**

The meaningful participation in all aspects of educational program development and implementation by those affected by such programs is an essential requisite for success. Such participation not only enhances program responsiveness to the needs of those served, but also provides them with the opportunity to determine and affect the desired level of educational achievement and satisfaction which education can and should provide. Consistent with this concept, maximum Indian participation in the development, approval, and implementation of all programs contracted under this part is required.

**§ 273.104 How will the Secretary extend geographic coverage and enhance participation under the Johnson-O'Malley Act?**

The Secretary will, to the extent practicable, and subject to the availability of appropriations, ensure full geographic coverage and the full participation of all federally recognized Tribes and school districts, regardless of whether the school districts had entered into a contract under the Johnson-O'Malley Act before fiscal year 1995.

**§ 273.105 How do these regulations affect existing Tribal rights?**

Nothing in these regulations may be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian Tribe;

(b) Authorizing or requiring the termination, waiving, modifying, or reducing of any existing trust responsibility of the United States with respect to the Indian people;



(c) Permitting significant reduction in services to Indian people as a result of this part; or

(d) Mandating an Indian Tribe to request a contract or contracts. Such requests are strictly voluntary.

#### **§ 273.106 What key terms do I need to know?**

Terms used in this part:

*Academic year* means the period of the year during which students attend an educational institution.

*Appeal* means a request for an administrative review of an adverse Agency decision.

*Approving official* means the Regional Director, or Agency Superintendents (for Tribes assigned under their management), has the responsibility and duties to review, approve or decline the contract in accordance with the Act.

*Awarding official* means any person who by appointment or delegation in accordance with applicable regulations has the authority to enter into and administer contracts on behalf of the United States of America and make determinations and findings with respect thereto. Pursuant to the Act, this person can be any Federal official, including but not limited to, contracting officers or awarding official technical representatives.

*Bureau* means the Bureau of Indian Education or Bureau of Indian Affairs, as applicable.

*Calendar year* means the period of 365 days (or 366 days in leap years) starting from January 1.

*Capital outlay* means money spent to acquire, maintain, repair, or upgrade capital asset. Capital assets, also known as fixed assets, may include machinery, land, facilities, or other business necessities that are not expended during normal use.

*Contract* means to transfer the funds in support of the efforts designed to meet the specialized and unique educational needs of Indian students in the Johnson-O'Malley program from the Federal Government to the contractor.

*Contracting party* means an entity that has a contract through a program authorized under the Johnson-O'Malley Act.

*Contractor* means any Tribal organization, State, school district, or Indian corporation to which a contract has been awarded.

*Days* means calendar days; except where a date specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period will carry over to the next business day.

*Debt retirement* means the act of paying off debt completely to a lender.

*Director* means the Director of the Bureau of Indian Education or Bureau of Indian Affairs, as applicable.

*Economic enterprise* means any commercial, industrial, agricultural, or business activity that is at least 51 percent Indian owned, established or organized for the purpose of profit.

*Education plan* means a comprehensive plan for the programmatic and fiscal services of and accountability by a contractor for the education of eligible Indian students.

*Eligible entity* means a Tribal organization, State, public school district, or Indian corporation is eligible to request a contract for a supplemental or operational support program under this Act. For purposes of this part, previously private schools are considered Tribal organizations.

*Existing contracting party* means a contracting party that has a contract under this Act that is in effect on the date of the JOM Modernization Act (Pub. L. 115-404), enacted December 31, 2018.

*Fiscal year* means the period used by the Bureau for accounting and budget purposes. The Bureau's fiscal year begins October 1 and ends September 30.

*Indian* means a person who is a member of an Indian Tribe.

*Indian Advisory School Board* means an Indian advisory school board established pursuant to 25 U.S.C. 5342-5347 prior to January 4, 1975.

*Indian corporation* means a legally established organization of Indians chartered under State or Federal law and which is not included within the definition of "Tribal organization".

*Indian Education Committee* means one of the entities specified by § 273.115.

*Indian Tribe* means any Indian Tribe, band, nation, rancheria, pueblo, colony or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is federally recognized as eligible by the U.S. Government through the Secretary for the special programs and services provided by the Secretary to Indians because of their status as Indians.

*Initial contract proposal* and *contract proposal* means a proposal for education contracts under the Johnson-O'Malley Act for the purpose of financially assisting those efforts designed to meet the specialized and unique educational needs of eligible Indian students, including programs supplemental to the regular school program and school operational support, where such support is necessary to maintain established State educational standards.

*Johnson-O'Malley Act* means the Act of April 16, 1934 (48 Stat. 596), as amended by the Act of June 4, 1936 (49 Stat. 1458, 25 U.S.C. 452-456), and by the Act of January 4, 1975 (88 Stat. 2203), and further amended by the Johnson-O'Malley Supplemental Indian Education Program Modernization Act (Pub. L. 115-404), enacted December 31, 2018 (JOM Modernization Act).

*Local Indian Committee* means any committee established pursuant to 20 U.S.C. 7424(c)(4), which provides that the committee may be composed of and selected by parents and family member of Indian children; representatives of Indian Tribes or Indian lands; teachers in the schools; and if appropriate, Indian students attending secondary schools.

*New contracting party* means an entity that enters into a contract under this Act after the date of enactment of the JOM Modernization Act (Pub. L. 115-404), enacted December 31, 2018.

*Operational support* means those expenditures for school operational costs in order to meet established State educational standards or Statewide requirements and as specified in § 273.126.

*Previously private school* means a school (other than a Federal school formerly operated by the Bureau) that is operated primarily for Indian students from age 3 years through grades 12; and, which at the time of application is controlled, sanctioned, or chartered by the government body(s) of an Indian Tribe(s).

*Public school district* means a school district that (a) serves public elementary schools or public secondary schools; and (b) has established or will establish local committees or is using a committee or Indian advisory school board to approve supplementary or operational support programs beneficial to Indian students.

*Regional Director* means the Bureau of Indian Affairs Regional Director or Bureau of Indian Education Associate Deputy Director, as applicable.

*Reservation or Indian reservation* means any Indian Tribe's reservation, pueblo, colony, or rancheria, including former reservations in Oklahoma, Alaska Natives regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

*School district or local education agency* means that subdivision of the State which contains the public elementary and secondary educational institutions providing educational services and is controlled by a duly elected board, commission, or similarly constituted assembly.

*Scope of work* means a framework document that will outline the work that will be performed under a contract and detail the expectations for the Johnson-O'Malley program.

*Secretary* means the Secretary of the Interior.

*State* means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and each of the outlying areas, or any political subdivision of the 50 States.

*School official* or *school administrator* means a person employed by the school in an administration, supervisory, academic, or support staff position.

*Supplemental program* means a program designed to meet the specialized and unique educational needs of eligible Indian students that may have resulted from socio-economic conditions of the parents, from cultural or language differences or other factors. Programs may also provide academic assistance to Indian students for the improvement of student learning, increase the quality of instruction, and as provided by § 273.143(b).

*System of record* means a system of record that contains information that is retrieved by an individual name or other unique identifiers.

*Tribal government*, *Tribal governing body* and *Tribal Council* means the recognized governing body of an Indian Tribe.

*Tribal organization* means the recognized governing body of any Indian Tribe or any legally established organization of Indians or Tribes which is controlled, sanctioned, or chartered by such governing body or bodies, or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.

## **Subpart B—Program Eligibility & Applicability**

### **§ 273.110 Who is eligible to request contracts under the Johnson-O'Malley Act?**

The following entities are eligible to enter into an education contract under the Johnson-O'Malley Act for the purpose of financially assisting efforts designed to meet the specialized and unique educational needs of eligible Indian students, including supplemental programs and school operational support, where such support is necessary to maintain established State educational standards:

- (a) Tribal organizations;
- (b) States;
- (c) Public school districts that:
  - (1) Serve public elementary schools or public secondary schools; and
  - (2) Have a local school board composed of a majority of Indians or have established or will establish an Indian Education Committee, as described in § 273.115 to approve supplementary or operational support programs beneficial to Indian students; and
- (d) Indian corporations.

**§ 273.111 How do the requirements for Tribal organizations differ from those for other eligible entities?**

(a) States, public school districts, or Indian corporations must comply with the requirements in this part.

(b) The requirements of this part apply to Tribal organizations, except that Tribal organizations do not need to comply with:

- (1) § 273.113, regarding how funds can be used under the Johnson O'Malley Act;
- (2) §§ 273.120 - 273.121, regarding approval of an education plan by the Director;
- (3) § 273.125, regarding entering into a contract as a new contracting party;

(4) §§ 273.132 - 273.135, regarding review, approval, and negotiation of the contract;

(5) § 273.142, regarding advance payments;

(6) Any section in subpart H - General Contract Requirements (other than the following sections, which still apply: § 273.170, regarding special program provisions to be included in a contract, § 273.172, regarding State employees' access to Tribal lands, reservations or allotments, and § 273.182, regarding penalties for misusing funds or property);

(7) Any section in subpart I - Contract Renewal, Revisions, and Cancellations (other than § 273.194, regarding the Indian Education Committee's authority to revoke contracts, which still applies);

(8) Any section in Subpart K - Appeals (other than § 273.208).

(c) The contract proposal submitted by the Tribal organization must meet the requirements in part 900 of this chapter, in addition to those in § 273.130. The requirements in part 900 of this chapter apply to contracts with Tribal organizations, except for the provisions in §§ 900.240 through 900.256 of this chapter concerning retrocession and reassumption of programs. If a Tribal organization retrocedes a contract, the Bureau will then contract with a State, public school district, or Indian corporation for the supplemental programs or operational support.

#### **§ 273.112 Who is an eligible Indian student under the Johnson-O'Malley Act?**

An Indian student is eligible for benefits provided by a Johnson O'Malley contract if the student is:

(a) From age three (3) years through grade(s) twelve (12);



(b) Is not enrolled in a Bureau or sectarian operated school; and

(c) Is either:

(1) At least one-fourth (1/4) degree Indian blood descendant of a member of a federally recognized Indian Tribe; or

(2) A member of a federally recognized Tribe.

**§ 273.113 How can the funds be used under the Johnson-O'Malley Act?**

An eligible entity may use the funds available under the contract to provide educational benefits to eligible Indian students to:

(a) Carry out programs or expand programs in existence before the contract period that provide:

(1) Remedial instruction, counseling, and cultural programs;

(2) Selected courses related to the academic and professional disciplines; or

(3) Important needs, such as school supplies and items that enable recipients to participate in curricular and extra-curricular programs;

(b) Establish targeted and culturally sensitive dropout prevention activities; and

(c) Purchase equipment to facilitate training for professional trade skills and intensified college preparation programs.

**§ 273.114 What programs may be contracted under the Johnson-O'Malley Act?**

All programs contracted under this part must:

(a) Be developed and approved in full compliance with the powers and duties of the Indian Education Committee and as may be contained in the Committee's organizational documents and bylaws.

(b) Be included as a part of the education plan.

### **Subpart C - Indian Education Committee**

#### **§ 273.115 Who determines the unique educational needs of eligible Indian students?**

When a school district to be affected by a contract(s) for the education of Indians has a local school board composed of a majority of Indians, the local school board may act as the Indian Education Committee; otherwise, the parents of Indian children may elect an Indian Education Committee from among their number or a Tribal governing body(ies) of the Indian Tribe(s) affected by the contract(s) may specify one of the following entities to serve as the Indian Education Committee:

- (a) A Local Indian Committee or Committees; or
- (b) An Indian Advisory School Board or Boards.

#### **§ 273.116 Does an Indian Education Committee need to establish procedures and report to the Regional Director?**

The Indian Education Committee and its members must establish procedures under which the Committee serves. Such procedures must be set forth in the Committee's organizational documents and by-laws.

- (a) Each Committee must file a copy of its organizational documents and by-laws with the Regional Director, together with a list of its officers and members.
- (b) The existence of an Indian Education Committee may not limit the continuing participation of the rest of the Indian community in all aspects of programs contracted under this part.

#### **§ 273.117 What are the powers and duties of the Indian Education Committee?**

Consistent with the purpose of the Indian Education Committee, each such Committee is vested with the authority to undertake the activities in paragraphs (a) through (d) of this section.

(a) Participate fully in the planning, development, implementation, and evaluation of all programs, including both supplemental and operational support, conducted under a contract or contracts pursuant to this part. Such participation includes further authority to:

(1) Recommend curricula, including texts, materials, and teaching methods to be used in the contracted program or programs;

(2) Approve budget preparation and execution;

(3) Recommend criteria for employment in the program;

(4) Nominate a reasonable number of qualified prospective educational programmatic staff members from which the contractor would be required to select; and

(5) Evaluate staff performance and program results and recommend appropriate action to the contractor.

(b) Approve and disapprove all programs to be contracted under this part. All programs contracted require the prior approval of the appropriate Indian Education Committee.

(c) Secure a copy of the negotiated contract(s) that includes the program(s) approved by the Indian Education Committee.

(d) Recommend to the Director through the appropriate awarding official cancellation or suspension of a contract(s) that contains the program(s) approved by the Indian Education Committee if the contractor fails to permit the Committee to exercise its powers and duties.

**§ 273.118 Are there additional authorities an Indian Education Committee can exercise?**

The organizational papers and by-laws of the Indian Education Committee may include additional powers and duties that would permit the Committee to:

- (a) Participate in negotiations concerning all contracts;
- (b) Make an annual assessment of the learning needs of Indian children in the community affected;
- (c) Have access to all reports, evaluations, surveys, and other program and budget related documents determined necessary by the Committee to carry out its responsibilities, subject only to the provisions of § 273.180;
- (d) Request periodic reports and evaluations regarding the Indian education program;
- (e) Establish a local grievance policy and procedures related to programs in the education plan;
- (f) Meet regularly with the professional staff serving Indian children and with the local education agency;
- (g) Hold committee meetings on a regular basis which are open to the public; and
- (h) Have such additional powers as are consistent with these regulations.

**Subpart D - Education Plan**

**§ 273.119 What is an education plan and what must it include?**

A prospective contractor in consultation with its Indian Education Committee(s) must formulate an education plan that contains educational objectives that adequately

address the educational needs of the Indian students and assures that the contract is capable of meeting such objectives. The education plan must contain:

(a) The education programs developed and approved by the Indian Education Committee(s);

(b) Educational goals and objectives that adequately address the educational needs of the Indian students to be served by the contract;

(c) Procedures for addressing hearing grievances from Indian students, parents, guardians, community members, and Tribal representatives relating to the program(s) contracted. Such procedures must provide for adequate advance notice of the hearing;

(d) Established State standards and requirements that must be maintained in operating the contracted programs and services;

(e) A description of how the State standards and requirements will be maintained;

(f) A requirement that the contractor comply in full with the requirements concerning meaningful participation by the Indian Education Committee;

(g) A requirement that education facilities receiving funds be open to visits and consultations by the Indian Education Committee(s), Tribal representatives, Indian parents and guardians in the community, and by duly authorized representatives of the Federal and State Governments;

(h) An outline of administrative and fiscal management procedures to be used by the contractor;

(i) Justification for requesting funds for operational support. The public school district must establish in its justification that it meets the requirements given in

§ 273.126(b). The information given should include records of receipt of local, State, and Federal funds;

(j) Budget estimates and financial information needed to determine program costs to contract for services. This includes, but is not limited to, the following:

(1) State and district average operational cost per pupil;

(2) Other sources of Federal funding the applicant is receiving, the amount received from each, the programs being funded, and the number of eligible Indian students served by such funding;

(3) Administrative costs involved, total number of employees, and total number of Indian employees;

(4) Costs that parents normally are expected to pay for each school;

(5) Supplemental and operational funds outlined in a separate budget, by line item, to facilitate accountability; and

(6) Total number of employees for each special program and number of Indian employees for that program;

(k) The total enrollment of school or district, by age and grade level;

(l) The eligible Indian enrollment—total and classification by Tribal affiliation(s) and by age and grade level;

(m) The total number of school board members and number of Indian school board members;

(n) Government equipment needed to carry out the contract;

(o) The period of contract term requested;

(p) The signature of the authorized representative of applicant; and

(q) Written information regarding:

(1) Program goals and objectives related to the learning needs of potential target students;

(2) Procedures and methods to be used in achieving program objectives, including ways whereby parents, students and communities have been involved in determining needs and priorities;

(3) Overall program implementation including staffing practices, parental and community involvement, evaluation of program results, and dissemination thereof; and

(4) Determination of staff and program effectiveness in meeting the stated needs of target students.

**§ 273.120 Does an education plan need to be approved by the Regional Director?**

The Secretary will not enter into any contract for the education of Indians unless:

(a) The contractor has submitted an education plan to the Regional Director; and

(b) The Regional Director has determined that the education plan contains educational objectives that adequately address the educational needs of the Indian students who are to be beneficiaries of the contract, and that the contract is capable of meeting such objectives.

**§ 273.121 When does the Regional Director approve the education plan?**

The Regional Director approves the education plan when a contractor submits a contract proposal for funding.

**Subpart E—Contract Proposal, Review, and Approval**

**§ 273.125 How may a new contracting party request a contract under the Johnson-O'Malley Act?**

Subject to the availability of appropriations, eligible entities who have not previously entered into a contract for the Johnson-O'Malley program may submit an initial contract proposal.

**§ 273.126 What proposals are eligible for contracts under the Johnson-O'Malley Act?**

(a) Any proposal to contract for funding a supplemental program will be considered an eligible proposal.

(b)(1) To contract for operational support, a public school district is required to establish in the proposal that it:

(i) Cannot meet the applicable minimum State standards or requirements without such funds;

(ii) Has made a reasonable tax effort with a mill levy at least equal to the State average in support of educational programs;

(iii) Has fully utilized all other sources of financial aid, including all forms of State aid and Pub. L. 874 payments, and the State aid contribution per pupil is at least equal to the State average;

(iv) Has at least 70 percent eligible Indian enrollment;

(v) Has clearly identified the educational needs of the students intended to benefit from the contract;

(vi) Has made a good faith effort in computing State and local contributions without regard to contract funds pursuant to this part; and



(vii) Will not budget or project a deficit by using contract funds pursuant to this part.

(2) The requirements given in paragraph (b)(1) of this section do not apply to previously private schools.

**§ 273.127 Can a contract include funds to support the duties of an Indian Education Committee?**

Programs developed or approved by the Indian Education Committee may, at the option of such Committee, include funds for the performance of Committee duties to include:

(a) Members' attendance at regular and special meetings, workshops and training sessions, as the Committee deems appropriate.

(b) Other reasonable expenses incurred by the Committee in performing its primary duties, including the planning, development, implementation and evaluation of the program.

**§ 273.128 How are contracts prioritized?**

Priority will be given to contracts:

(a) Which would serve Indian students on or near reservations; and

(b) Where a majority of the Indian students will be members of the Tribe(s) of those reservations.

**§ 273.129 May the Regional Director reimburse a public school district for educating non-resident Indian students?**

The Regional Director may consider a contract proposal to reimburse a public school district for the full per capita costs of educating Indian students who meet all of the following:

- (a) Are members of recognized Indian Tribes;
- (b) Do not normally reside in the State in which the school district is located; and
- (c) Are residing in Federal boarding facilities for the purpose of attending public schools within the school district.

**§ 273.130 What is required in the contract proposal for funding?**

A contract proposal must be in writing and contain the following:

- (a) Name, address, and telephone number of the proposed contractor;
- (b) Name, address, and telephone number of the Tribe(s) to be served by the contract;
- (c) Descriptive narrative of the contract proposal;
- (d) The education plan approved by the Indian Education Committee;
- (e) A separate budget outlining the Johnson-O'Malley funds for operational support and/or supplemental programs, by line item, to facilitate accountability;
- (f) A clear identification of what educational needs the Johnson-O'Malley funds requested for operational support will address; and
- (g) Documentation of the requirements for operational support in § 273.126(b)(1).

**§ 273.131 What is required for a Tribal request for a contract?**

- (a) An Indian Tribal governing body that desires that a contract be entered into with a Tribal organization must notify the Regional Director.

(b) The Tribal governing body has the option to contract with the State, public school district, or Indian corporation.

**§ 273.132 Who will review and approve the contract proposal?**

Each approving official within each Bureau Region is authorized to approve the contract(s) submitted by the State, public school district, or Indian corporation to provide services to Indian children within that approving official's region.

**§ 273.133 What is the process for review and decision?**

Upon receiving a contract proposal, the approving official will:

(a) Notify the applicant in writing that the contract proposal has been received, within 14 days after receiving the contract proposal.

(b) Review the contract proposal for completeness and request, within 20 days after receiving the contract proposal, any additional information from the applicant which will be needed to reach a decision.

(c) On receiving the contract proposal for operational support, make a formal written determination and findings supporting the need for such funds. In arriving at such a determination, the approving official must be assured that each local education agency has made a good faith effort in computing State and local contributions without regard to funds requested.

(d) Assess the completed contract proposal to determine if the proposal is feasible and if the proposal complies with the appropriate requirements of the Johnson-O'Malley Act and this part.

(e) Approve or disapprove the contract proposal after fully reviewing and assessing the application and any additional information submitted by the applicant.

(f) Promptly notify the applicant in writing of the decision to approve or disapprove the contract proposal.

(g) If the contract proposal is disapproved, the notice will give the reasons for disapproval and the applicant's right to appeal pursuant to Subpart K of this part.

**§ 273.134 What is the timeframe for contract decision?**

The approving official will approve or disapprove the contract proposal within 90 days after the approving official receives the contract proposal and any additional information requested. The approving official may extend the 90-day deadline after obtaining the written consent of the applicant.

**§ 273.135 Who will negotiate the contract?**

After the approving official has approved the contract proposal, the awarding official, assisted by Bureau education personnel, will negotiate the contract.

**Subpart F – Funding Provisions**

**§ 273.140 What is the funding formula to distribute funds?**

Funds will be distributed to contractors based upon a funding formula. The funding formula is calculated using data obtained by the Department of Education from the previous year.

(a) The funding formula to determine the funding to be distributed to each contractor is the Weight Factor multiplied by the number of eligible Indian students, where the Weight Factor is:

(1) The State average cost per pupil count divided by the national average cost per pupil count; or

(2) A default weight factor of 1.3, if the calculation in paragraph (a)(1) of this section results in a weight factor of less than 1.3.

(b) Notwithstanding any other provisions of the law, Federal funds appropriated for the purpose will be allotted pro rata in accordance with the distribution method outlined in this formula.

(c) For four fiscal years following the date of enactment of the JOM Modernization Act (December 31, 2018):

(1) Existing contractors will not receive an amount that is less than the amount received for Fiscal Year 2017 (the fiscal year preceding the date of enactment of the JOM Modernization Act), unless:

(i) The existing contractor fails to submit a complete annual report;

(ii) The Secretary has found that the existing contractor has violated the terms of a contract under this part; or

(iii) The number of eligible students reported in the annual report has decreased below the number of eligible students served by the existing contractor in Fiscal Year 2017 (the fiscal year preceding the date of enactment of the JOM Modernization Act).

(2) Paragraph (c)(1)(iii) of this section notwithstanding, no existing contractor will receive an amount of funding per eligible student that is less than the amount of funding per eligible Indian student that the existing contractor received for Fiscal Year 2017 (the fiscal year preceding the enactment of the JOM Modernization Act).

(d) Beginning December 31, 2022 (4 years after the December 31, 2018, date of enactment of the JOM Modernization Act), no contracting party will receive for a fiscal

year more than a 10 percent decrease in funding per eligible Indian student from the previous year.

**§ 273.141 Will funding be prorated?**

All monies provided by a contract may be expended only for the benefit of eligible Indian students. Where students other than eligible Indian students participate in programs contracted, money expended under the contract will be prorated to cover the participation of only the eligible Indian students, except where the participation of non-eligible students is so incidental as to be *de minimis*. Such *de minimis* participation must be approved by the Indian Education Committee.

**§ 273.142 Are advance payments on a contract allowed under the Johnson-O'Malley Act?**

Payments to States, public school districts and Indian corporations will be made in advance or by way of reimbursement and in such installments and on such conditions as the Regional Director deems necessary to carry out the purposes of the Act.

**§ 273.143 Must other Federal, State and local funds be used?**

(a) Contract funds under this part supplement, and do not supplant, Federal, State and local funds. Each contract must require that the use of these contract funds will not result in a decrease in State, local, or Federal funds that would be made available for Indian students if there were no funds under this part.

(b) State, local and other Federal funds must be used to provide comparable services to non-Indian and Indian students prior to the use of contract funds.

(c) Except as hereinafter provided, the school lunch program of the United States Department of Agriculture (USDA) constitutes the only federally funded school lunch

program for Indian students in public schools. Where Indian students do not qualify to receive free lunches under the National School Lunch Program of USDA because such students are non-needy and do not meet the family size and income guidelines for free USDA lunches, plans prepared pursuant to § 273.119 may provide, to the extent of funding available for Johnson-O'Malley programs, for free school lunches for those students who do not qualify for free USDA lunches but who are eligible students under § 273.112.

**§ 273.144 Can Johnson-O'Malley funds be used for capital outlay or debt retirement?**

In no instance may contract funds provided under this part be used as payment for capital outlay or debt retirement expenses; except that, such costs are allowable if they are considered to be a part of the full per capita cost of educating eligible Indian students who reside in Federal boarding facilities for the purpose of attending public schools.

**§ 273.145 How can funds be used for subcontractors?**

The Bureau may make contract funds under the Johnson-O'Malley Act available directly only to Tribal organizations, States, public school districts, and Indian corporations. However, Tribal organizations, States, public school districts, and Indian corporations receiving funds may use the funds to subcontract for necessary services with any appropriate individual, organization, or corporation.

**§ 273.146 Can funds be used outside of schools?**

Nothing in this part prevents the Regional Director from contracting with Indian corporations who will expend all or part of the funds in places other than the public or private schools in the community affected.

**§ 273.147 Are there requirements of equal quality and standard of education?**

Contracts with State education agencies or public school districts receiving funds must provide educational opportunities to all Indian children within that school district on the same terms and under the same conditions that apply to all other students as long as it will not affect the rights of eligible Indian children to receive benefits from the supplemental programs. Public school districts receiving funds must ensure that Indian children receive all aid from the State, and proper sources other than the Johnson-O'Malley contract, which other schools in the district and other school districts similarly situated in the State are entitled to receive. In no instance may there be discrimination against Indians or the schools enrolling Indians.

**Subpart G – Annual Reporting Requirements**

**§ 273.150 Does an existing contracting party need to submit any reports?**

Each existing contracting party must submit an annual report based on the JOM funding received and other contract-related reports as required by the Regional Director.

**§ 273.151 What information must the existing contracting party provide in the annual report?**

Existing contracting parties who receive Johnson-O'Malley funding must submit the following information in the annual report:

- (a) General information about the contractor;
- (b) General information about the number and names of the schools;
- (c) The number of eligible Indian students who were served using amounts allocated under the contract during the previous fiscal year;



(d) An accounting of the amounts and purposes for which the contract funds were expended;

(e) Information on the conduct of the program;

(f) A quantitative evaluation of the effectiveness of the contract program in meeting the stated objectives contained in the educational plans; and

(g) A complete accounting of actual receipts at the end of the fiscal year for which the contract funds were expended.

**§ 273.152 When is the annual report due?**

All existing contracting parties must submit the annual report to the awarding official on or before September 15 of each year and covering the previous academic year.

**§ 273.153 Who else needs a copy of the annual report?**

All existing contracting parties must send copies of the annual reports to the Indian Education Committee(s) and to the Tribe(s) under the contract at the same time as the reports are sent to the awarding official.

**§ 273.154 What will happen if the existing contracting party fails to submit an annual report?**

Any existing contracting party that fails to submit the annual report will receive no amounts under this Act for the fiscal year following the academic year for which the annual report should have been submitted.

**§ 273.155 How will the existing contracting party know when reports are due?**

The awarding official will provide existing contracting parties with timely information relating to:

(a) Initial and final reporting deadlines; and

(b) The consequences of failure to comply.

**§ 273.156 Will technical assistance be available to comply with the annual reporting requirements?**

The Bureau will provide technical assistance and training on compliance with the reporting requirements to existing contracting parties. The Bureau will provide such technical assistance and training on an ongoing and timely basis.

**§ 273.157 What is the process for requesting technical assistance and/or training?**

(a) Existing contracting parties may request technical assistance and/or training by addressing the request in writing to the Regional Director.

(b) The Regional Director, or designee, will acknowledge receipt of a request for technical assistance and/or training.

(c) No later than 30 days after receiving the original request, the Regional Director will identify a point of contact and begin the process of providing technical assistance and/or training. The Regional Director and requesting contracting party will work together to identify the form, substance, and timeline for the assistance.

**§ 273.158 When should the existing contracting party request technical assistance and/or training?**

The existing contracting party is encouraged to request technical assistance and/or training before annual reporting requirements are due in order to avoid the consequences for failure to comply.

**§ 273.159 If the existing contracting party reported a decrease of eligible Indian students, how will funding be reduced?**

Except as provided in § 273.140(c)-(d) of this part, for four fiscal years following the date of enactment of the JOM Modernization Act (December 31, 2018) an existing contracting party's funding will not be reduced to a level that is less than the amount of funding per eligible Indian student that the existing contracting party received for Fiscal Year 2017 (the fiscal year preceding the date of enactment of the Johnson-O'Malley Modernization Act).

**§ 273.160 Can the Secretary apply a ratable reduction in Johnson-O'Malley program funding?**

If the funds available under the Johnson-O'Malley Act for a fiscal year are insufficient to pay the full amounts that all existing contracting parties are eligible to receive under for the fiscal year, the Secretary will ratably reduce those amounts for the fiscal year.

**§ 273.161 What is the maximum decrease in funding allowed?**

Beginning December 31, 2022 (4 years after the December 31, 2018, date of enactment of the JOM Modernization Act), no contracting party may receive for a fiscal year more than a 10 percent decrease in funding per eligible Indian student from the previous fiscal year.

**Subpart H – General Contract Requirements**

**§ 273.170 What special program provisions must be included in the contract?**

All contracts must contain the following:

- (a) The education plan approved by the Indian Education Committee(s);

(b) Any formal written determination and findings made by the Regional Director supporting the need for operational support as required by § 273.133(c); and

(c) A provision that State, local, and other Federal Funds will be used to provide comparable services to non-Indian and Indian students prior to the use of Johnson-O'Malley funds for the provision of supplementary program services to Indian children, as required in § 273.143(b).

**§ 273.171 Can a contractor make changes to a program approved by an Indian Education Committee?**

No program contracted may be changed from the time of its original approval by the Indian Education Committee to the end of the contract period without the prior approval, in writing, of the Indian Education Committee.

**§ 273.172 May State employees enter Tribal lands, reservations or allotments?**

In those States where Pub. L. 83-280 (18 U.S.C. 1162 and 28 U.S.C. 1360) do not confer civil jurisdiction, State employees may be permitted to enter upon Indian Tribal lands, reservations, or allotments in an official capacity in connection with a contract under this part if the duly constituted governing body of the Tribe adopts a resolution of consent for the following purposes:

(a) Inspecting school conditions in the public schools located on Indian Tribal lands, reservations, or allotments; or

(b) Enforcing State compulsory school attendance laws against Indian children, parents or persons standing in *loco parentis*.

**§ 273.173 What procurement requirements apply to contracts?**

States, public school districts, or Indian corporations wanting to contract with the Bureau must comply with the applicable requirements in the Federal Acquisition Regulations at 48 CFR part 1.

**§ 273.174 Are there any Indian preference requirements for contracts and subcontracts?**

(a) Any contract made with a State, public school district, or Indian corporation for the benefit of Indian students must require that the contractor, to the greatest extent feasible:

(1) Give preference in and opportunities for employment and training to Indians in connection with the administration of such contract(s); and

(2) Give preference in the award of subcontracts to Indian organizations and Indian-owned economic enterprises.

(b) All subcontractors employed by the contractor must, to the extent possible, give preference to Indians for employment and training and must include in their bid submission a plan to achieve maximum use of Indian personnel.

**§ 273.175 How will a Tribal governing body apply Indian preference requirements for contracts and subcontracts?**

A Tribal governing body may develop its own Indian preference requirements for its contracts and subcontracts.

**§ 273.176 May there be a use and transfer of Government property?**

(a) The use of Government-owned facilities for school purposes may be authorized when not needed for Government activities. Transfer of title to such facilities (except land) may be arranged under the provisions of the Act of June 4, 1953 (67 Stat.

41) subject to the approval of the Tribal government if such property is located on a reservation.

(b) In carrying out a contract, the Regional Director may, with the approval of the Tribal government, permit a contractor to use existing buildings, facilities, and related equipment and other personal property owned by the Bureau within its jurisdiction under terms and conditions agreed upon for their use and maintenance. The property at the time of transfer must conform to the minimum standards established by the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651). Use of Government property is subject to the following conditions:

(1) When nonexpendable Government property is turned over to public school authorities or Indian corporations under a use permit, the permittee must insure such property against damage by flood, fire, rain, windstorm, vandalism, snow, and tornado in amounts and with companies satisfactory to the Federal officer in charge of the property. In case of damage or destruction of the property by flood, fire, rain, windstorm, vandalism, snow, or tornado, the insurance money collected may be expended only for repair or replacement of property. Otherwise, insurance proceeds must be paid to the Bureau.

(2) If the public school authority is self-insured and can present evidence of that fact to the Regional Director, insurance for lost or damaged property will not be required. However, the public school authority will be responsible for replacement of such lost or damaged property at no cost to the Government or for paying the Government enough to replace the property.

(3) The permittee will maintain the property in a reasonable state of repair consistent with the intended use and educational purposes.

(c) The contractor may have access to existing Bureau records needed to carry out a contract under this part, as follows:

(1) The Bureau will make the records available subject to the provisions of the Freedom of Information Act (5 U.S.C. 552), as amended by the Act of November 21, 1974 (Pub. L. 93-502, 88 Stat. 1561).

(2) The contractor may have access to needed Bureau records at the appropriate Bureau office for review and making copies of selected records.

(3) If the contractor needs a small volume of identifiable Bureau records, the Bureau will furnish the copies to the contractor.

**§ 273.177 Who will provide liability and motor vehicle insurance?**

(a) States, school districts, and Indian corporations must obtain public liability insurance under contracts entered into with the Bureau, unless the Bureau approving official determines that the risk of death, personal injury or property damage under the contract is small and that the time and cost of procuring the insurance is great in relation to the risk.

(b) Notwithstanding paragraph (a) of this section, any contract which requires or authorizes, either expressly or by implication, the use of motor vehicles must contain a provision requiring the State, school district, or Indian corporation to provide liability insurance, regardless of how small the risk.

(c) If the public school authority is self-insured and can present evidence of that fact to the approving official, liability and motor vehicle insurance will not be required.

**§ 273.178 Are there contract recordkeeping requirements?**

A contractor will be required to maintain a recordkeeping system that allows the Bureau to meet its legal records program requirements under the Federal Records Act (44 U.S.C. 3101 *et seq.*). Such a record system must:

(a) Fully reflect all financial transactions involving the receipt and expenditure of funds provided under the contract in a manner that will provide accurate, current and complete disclosure of financial status; correlation with budget or allowable cost schedules; and clear audit facilitating data;

(b) Reflect the amounts and sources of funds other than Bureau contract funds that may be included in the operation of the contract;

(c) Provide for the creation, maintenance, and safeguarding of records of lasting value, including those involving individual rights, such as permanent records and transcripts; and

(d) Provide for the orderly retirement of permanent records in accordance with Department Records Schedule (Bureau of Indian Affairs (075)), when there is no established system set up by the State, public school district, or Indian corporation.

**§ 273.179 Are there contract audit and inspection requirements?**

(a) During the term of a contract and for three (3) years after the project or undertaking is completed, the Regional Director, or any duly authorized representative, must have access, for audit and examination purposes, to any of the contractor's books, documents, papers, and records that, in the Regional Director's or representative's opinion, may be related or pertinent to the contract or any subcontract.



(b) The contractor is responsible for maintaining invoices, purchase orders, canceled checks, balance sheets and all other documents relating to financial transactions in a manner that will facilitate auditing. The contractor is responsible for maintaining files of correspondence and other documents relating to the administration of the contract, properly separated from general records or cross-referenced to general files.

(c) The contractor receiving funds is responsible for contract compliance.

(d) The records involved in any claim or expenditure that has been questioned must be further maintained until a final determination is made on the questioned expenditures.

(e) The contractor and local school officials must make available to each member of the Indian Education Committee and to members of the public upon request: all contracts, non-confidential records concerning students served by the program, reports, budgets, budget estimates, plans, and other documents pertaining to administration of the contract program in the preceding and current years. The contractor or local school official must provide, free of charge, single copies of such documents upon request.

**§ 273.180 Are there disclosure requirements for contracts?**

(a) Unless otherwise required by law, the Bureau may not place restrictions on contractors that will limit public access to the contractor's records except when records must remain confidential.

(b) A contractor must make all reports and information concerning the contract available to the Indian people that the contract affects. Reports and information may be withheld from disclosure only when both of the following conditions exist:

(1) The reports and information fall within one of the following exempt categories:

(i) Specifically required by statute or Executive Order to be kept secret;

(ii) Commercial or financial information obtained from a person or firm on a privileged or confidential basis; or

(iii) Personnel, medical, social, psychological, academic achievement and similar files where disclosure would be a clearly unwarranted invasion of personal privacy; and

(2) Disclosure is prohibited by statute or Executive Order or sound grounds exist for using the exemption given in paragraph (b)(1) of this section.

(c) A request to inspect or copy reports and information must be in writing and reasonably describe the reports and information requested. The request may be delivered or mailed to the contractor. Within 10 working days after receiving the request, the contractor must determine whether to grant or deny the request and immediately notify the request of the determination.

(d) The time limit for making a determination may be extended up to an additional 10 working days for good reason. The requester must be notified in writing of the extension, reasons for the extension, and date on which the determination is expected to be made.

#### **§ 273.181 Are there Privacy Act requirements for contracts?**

(a) When a contractor operates a system of records to accomplish a Bureau function, the contractor must comply with subpart K of 43 CFR part 2 which implements the Privacy Act (5 U.S.C. 552a). Examples of the contractor's responsibilities are:

(1) To continue maintaining systems of records declared by the Bureau to be subject to the Privacy Act;

(2) To make such records available to individuals involved;

(3) To disclose an individual's record to third parties only after receiving permission from the individual to whom the record pertains, and in accordance with the exceptions listed in 43 CFR 2.231;

(4) To establish a procedure to account for access, disclosures, denials, and amendments to records; and

(5) To provide safeguards for the protection of the records.

(b) The contractor may not, without prior approval of the Bureau:

(1) Discontinue or alter any established systems of records;

(2) Deny requests for notification or access of records; or

(3) Approve or deny requests for amendments of records.

(c) The contractor may not establish a new system of records without prior approval of the Department of Interior and the Office of Management and Budget.

(d) The contractor may not collect information about an individual unless it is relevant or necessary to accomplish a purpose of the Bureau as required by statute or Executive Order.

(e) The contractor is subject to 5 U.S.C. 552a(i)(1), which imposes criminal penalties for knowingly and willfully disclosing a record about an individual without the written request or consent of that individual unless disclosure is permitted under one of the exceptions.

**§ 273.182 Are there penalties for misusing funds or property?**

If any officer, director, agent, or employee of, or connected with, any contractor or subcontractor under this part embezzles, willfully misapplies, steals, or obtains by fraud any of the funds or property connected with the contract or subcontract, he or she will be subject to the following penalties:

(a) If the amount involved does not exceed \$100, person(s) will be fined not more than \$1,000 or imprisoned not more than one (1) year, or both.

(b) If the amount involved exceeds \$100, person(s) will be fined not more than \$10,000 or imprisoned for not more than two (2) years, or both.

**§ 273.183 Can the Secretary investigate a potential Civil Rights Act violation?**

In no instance may there be discrimination against Indians or schools enrolling Indians. When informed by a complainant or through its own discovery that a possible violation of title VI of the Civil Rights Act of 1964 exists within a State school district receiving funds, the Secretary will, in accordance with Federal requirements, notify the Department of Education of the possible violation. The Department Education will conduct an investigation into the matters alleged. If the report of the investigation conducted by the Department of Education discloses a failure or threatened failure to comply with this part, and if the non-compliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to contract or to continue financial assistance under the Johnson-O'Malley Act or by any other means authorized by law.

**Subpart I – Contract Renewal, Revisions, and Cancellations**

**§ 273.191 How may a contract be renewed for Johnson-O'Malley funding?**

An awarding official will notify the existing contracting party in advance of the contract's expiration and ask if the existing contracting party wants to renew the contract. The renewal must be in writing from the existing contracting party and the awarding official.

**§ 273.192 What is required to renew a contract?**

(a) The existing contracting party seeking to renew a contract will submit to the awarding official:

(1) A written request to renew;

(2) The current education plan approved by the Indian Education Committee, if expired;

(3) A new Tribal resolution, if the current one has expired or its terms do not address renewal;

(4) A scope of work; and

(5) A budget outlining the Johnson-O'Malley funds for operational support and/or supplemental programs, by line item, to facilitate accountability.

(b) The awarding official will send the existing contracting party an acknowledgment letter and specify if any information is required to complete renewal package.

(c) The approving official will approve or disapprove a renewal within 90 days after the approving official receives the renewal and any additional information requested. The approving official may extend the 90-day deadline after obtaining the written consent of the existing contracting party.

**§ 273.193 May a contract be revised or amended?**

Any contract may be revised or amended as deemed necessary to carry out the purposes of the program being contracted.

(a) A contractor may submit a written request for a revision or amendment of a contract to the awarding official.

(b) The written approval of the Indian Education Committee is required if the contract revision or amendment will alter a program that has been approved by the Indian Education Committee.

**§ 273.194 Does the Indian Education Committee have authority to cancel contracts?**

The Indian Education Committee may recommend to the Regional Director, through the appropriate awarding official, cancellation or suspension of a contract(s) that contains the program(s) approved by the Indian Education Committee, if the contractor fails to permit such Committee to exercise its powers and duties.

**§ 273.195 May a contract be cancelled for cause?**

(a) Any contract may be cancelled for cause when the contractor fails to perform the work called for under the contract or fails to permit an Indian Education Committee to perform its duties.

(b) Before cancelling the contract, the Regional Director will provide the contractor with written notice, including:

(1) The reasons why the Bureau is considering cancelling the contract; and

(2) The contractor will be given an opportunity to bring its work up to an acceptable level.

(c) If the contractor does not overcome the deficiencies in its contract performance, the Bureau will cancel the contract for cause. The Bureau will notify the

contractor, in writing, of the cancellation. The notice will give the reasons for the cancellation and the right of the contractor to appeal under subpart K of this part.

(d) When a contract is cancelled for cause, the Bureau will attempt to perform the work by another contract.

(e) Any contractor that has a contract cancelled for cause must demonstrate that the cause(s) that led to the cancellation have been remedied before it will be considered for another contract.

### **Subpart J – Responsibility and Accountability**

#### **§ 273.201 What is required for the Secretary to meet his or her reporting responsibilities?**

(a) The Secretary has the following reporting responsibilities to the Committee on Indian Affairs in the Senate; the Subcommittee on Interior, Environment, and Related Agencies of the Committee on Appropriations of the Senate; the Subcommittee on Indian, Insular, and Alaska Native Affairs of the Committee on Natural Resources of the House of Representatives; and the Subcommittee on Interior, Environment, and Related Agencies of the Committee on Appropriations of the House of Representatives:

(1) In order to provide information about the Johnson-O'Malley Program, the Bureau must obtain from all existing contracting parties the most recent determination of the number of eligible Indian students served by each contracting party.

(2) The Bureau will make recommendations on appropriate funding levels for the program based on such determination.

(3) The Bureau will make an assessment of the contracts under this Act.

(b) The Bureau will make such reports as described in subparagraph (a) of this section publically available.

**§ 273.202 Does this part include an information collection?**

The collections of information in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076-NEW. Responses is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

**Subpart K -- Appeals**

**§ 273.206 May a contract be appealed?**

(a) A contractor may appeal:

- (1) An adverse decision or action of the Bureau regarding a contract; or
- (2) A decision to cancel a contract for cause.

(b) The Secretary encourages contractors to seek all means of dispute resolution before a formal appeal.

**273.207 How does a contractor request dispute resolution?**

The contractor may request dispute resolution in writing to the Regional Director.

(a) The Bureau has in place an alternative dispute resolution (ADR) process.

(1) The ADR process is intended to be a supplement to, and not a replacement for, the normal appeal process.

(2) Participation as a complainant in the ADR process is voluntary.



(3) Should a contractor participate in an ADR process, the pre-complaint process may extend to 90 days.

(b) The ADR process may result in an informal resolution of the complaint;

(c) If the ADR process does not result in an informal resolution of the complaint, the contractor still has the right to continue to pursue an appeal.

**§ 273.208 How does a Tribal organization request an appeal?**

A Tribal organization may request an appeal pursuant to Part 900 of this Chapter.

**§ 273.209 How does a State, public school district, or an Indian corporation request an appeal?**

The State, public school district, or an Indian corporation may request an appeal by filing an appeal with the Civilian Board of Contract Appeals under the Contract Disputes Act, 41 U.S.C. 7101-7109, no later than 90 calendar days after the date the contractor receives the decision.

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**Tara Sweeney,**

*Assistant Secretary – Indian Affairs.*

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